IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 303 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VECHLABHAI BHALUBHAI RATHWA

Versus

STATE OF GUJARAT

Appearance:

MR MA KALATHIL for Appellant

MR KP RAWAL, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE M.C.PATEL

Date of decision: 07/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.C.PATEL)

1. The appellant was the accused in Sessions Case No.11 of 1995 before the Additional Sessions Judge, Vadodara (Camp at Chhota Udepur) who, by his judgment and order dated 20th February, 1996, convicted the appellant for the offence under Section 302 of the Indian Penal Code and sentenced him to life imprisonment and a fine of Rs.1,000/-, in default, simple imprisonment for six months.

2. The charge against the appellant was that on 11th February, 1994, he killed his cousin Himat Khoper by giving two axe blows, one on the forehead and the other on his back. The incident was alleged to have occurred at about 4 o'clock in the afternoon in the house in village Manka where the appellant was living with his father and other members of his family.

3. The prosecution case is to be found mainly in the evidence of three witnesses: (1) Bhurkiben Khoperbhai (P.W.1), who was the complainant, but not an eye-witness, (2) Keshliben Himatbhai (P.W.11) and (3) Dutiyabhai Khoperbhai (P.W.12) who, according to the prosecution case, were eye-witnesses.

4. According to Bhurkiben, the deceased Himat Khoper was her eldest son, her second son being Chandu and the third son being Dutiyo. Dutiyo was unmarried. All her sons and their wives and children lived together in the same house but separate rooms. Chandu was in jail at the time of the incident. She was living with Dutiyo. The house of Bhalu Fatu, who was the father of the appellant and the brother-in-law of Bhurkiben, was near their house. The appellant Vechla Bhalu was staying with his father. At the time of the incident, Bhurki was in a nearby stream making cow-dung cakes. At that time, Keshli, the wife of the deceased, came and told her that the appellant had killed her husband Himat. The appellant was the son of the elder brother of her husband. Keshli told her that Himat had been killed in the appellant's house. She went running to the place of incident and saw that Himat's dead body was lying in the house of the appellant. There were two injuries on his body, one on the forehead and the other on the back. According to her, Vechlabhai had previously punctured the eye of Dutiyo by shooting an arrow but, since he was their relative, no complaint was lodged and Vechla had promised to give Rs.15,000/- as compensation. However, Vechla did not pay the amount. His son Himat had, therefore, gone to his house to demand the payment of

Rs.15,000/- and the cost of treatment and then the incident had occurred. Himat's wife Keshli went to the Police Station at Chhota Udepur. The accused gave himself up at the police station. She replied to the question as to whether the police had recorded the complaint of Kesliben by saying that since she had gone to the police station, the police must have recorded it. The police came to their village at about 7.00 in the evening. They were all at the house of Vechla. The police recorded her complaint and she put her thumb impression on it. Her house was about 100 yards from the house of Vechla. The incident occurred at about 4.00 in the evening.

5. According to Keshliben, she had five children, the eldest being the son Babu, who was aged about 10. The incident occurred at about 4-5 o'clock in the evening. She was at home with her husband. Vechla came to call her husband and her husband went with him. She followed him and Babu and her brother-in-law Dutiyo also followed her. Vechla took her husband to his house saying that he would give the money. They were all standing in the 'aangna' of the house. Vechla took her husband into the house and then gave an axe blow on his head and after he fell down, he gave another blow on the back. When they raised shouts, the accused ran away with the axe. She went to inform her mother-in-law Bhurkiben where she was making dung cakes. Her mother-in-law came and saw the dead body of her husband. Thereafter, she lodged a complaint with the police. She too had gone to the police station at Chhota Udepur but before that, the accused had surrendered there. The complaint was recorded at village Manka and it was given by her mother-in-law. Vechla had punctured the eye of her brother-in-law Dutiyo but no complaint was lodged because the accused had agreed to pay Rs.15,000/-. He did not pay the amount and hence, there was a quarrel.

6. According to Dutiyo (P.W.12), the incident occurred at about 4 o'clock in the evening. About one year before the incident, he had a quarrel with the accused who shot an arrow and punctured his left eye. The matter was settled between them and the accused had agreed to pay Rs.15,000/- and hence, no complaint was lodged with the police. However, the accused did not pay the amount, though the deceased had repeatedly demanded the same. At the time of the incident, he, Keshli, the wife of the deceased, and their son Baniyo were standing outside the house of the accused. The accused came there and dragged his brother Himat inside saying that he would pay the money to him. They three remained standing

outside. After about two or three minutes, Vechla came out of the house with a blood-stained axe and started running away. They went inside and saw that Himat was lying dead in a pool of blood since he had been given axe blows. They, therefore, went to the Chhota Udepur Police Station where his sister-in-law Keshli lodged a complaint.

7. According to Head Constable Vimalben Pundalikrao (P.W.10), she was in charge as P.S.O. Chhota Udepur Police Station on 11th December, 1994. At about 5.30, the accused surrendered himself with an axe at the police station. The axe was blood-stained. An arrest panchnama was prepared. Bhikhabhai Jashbhai (P.W.6) was one of the panchas. According to him, the accused was there at the police station and so was the axe but there were no stains on the axe.

8. P.S.I. Kantibhai Ramjibhai Asari (P.W.14) was the Investigating Officer. He was on duty as Senior P.S.I. in the Police Station, Chhota Udepur on that day. According to him, Bhurkiben came to the police station at about 5 o'clock in the evening and she gave her complaint which was recorded. Thereafter, he went to the scene of offence, held an inquest and sent the dead-body for post-mortem to Community Health Centre, Chhota Udepur. A panchnama of the scene of offence was also prepared and a sample of the blood-stained earth was taken. The clothes on the body of the deceased were also attached under the panchnama.

9. After completing the investigation, he submitted the chargesheet.

10. The post-mortem was performed by Dr. Babulal Kalusinh Patidar (P.W.5). The dead-body was brought to him at 8.30 at night on 11th February, 1994 but he carried out the post-mortem next day morning i.e. on 12th February, 1994 between 8.30 and 10 o'clock. His evidence and the post-mortem report (Exh.19) show that there was an incised wound of 8.5 x 1.0 cm bone and skull cavity deep on right forehead and an incised wound of 8.5 x 2.0 cm pleural cavity deep in 9th intercoastal space on right back. There was a fracture of right frontal bone and the right lung had collapsed. He said that the cause of death was neurogenic and haemorrhagic shock following injury to brain and right chest. According to him, the injuries are possible by the Muddamal axe which was shown to him and they were sufficient to cause death in the ordinary course of nature. An attempt was made on behalf of the defence to show, relying on the discrepancy in the

dimensions of the injury on the forehead stated in the inquest report and the post-mortem report, that the dead-body which was examined by Dr. Babulal was not that of the deceased Himat. However, there is no substance in this contention. The medical evidence as to the dimension of the injury cannot be contradicted by the dimension of the injury stated in the inquest report. There is no doubt that the death of Himat was homicidal.

11. It will be seen from the above evidence that Bhurkiben, who according to the prosecution had lodged the complaint, was not an eye-witness. The learned Additional Sessions Judge has accepted the evidence of Keshliben and Dutiyo, who according to the prosecution, were eye-witnesses.

12. The learned counsel for the appellant submitted that their evidence is not trustworthy and credible and there are circumstances on record which create doubt about their claim to be present when the incident occurred. On the other hand, learned APP Mr. K.P. Rawal submitted that there is no reason to discard the evidence of these two eye-witnesses.

13. Now, the first question is at what time and place the complaint was lodged by Bhurkiben. According to her, Keshli had gone to the police station. The police came to their village and her complaint was taken at village Manka. In cross-examination, she positively stated that she and Babu stayed near the dead body and Keshli alone went to lodge the complaint. She must have left the village after 5 o'clock in the evening. According to Keshli, she did go to the police station but the accused had already surrendered himself and the complaint of her mother-in-law was recorded at Manka. However, the Investigating Officer K.R. Asari has stated that Bhurkiben came to the police station at Chhota Udepur and her complaint was recorded at about 5 o'clock in the evening. According to Bhurkiben, the police came to their village at 7 o'clock and recorded her complaint. Thus, there is doubt about the time and place of the lodging of the complaint. Secondly, according to Bhurkiben, Keshliben had informed her about the incident but there is no mention of Dutiyo or Babubhai in the complaint. Ordinarily, such omission may not be significant but, in the facts and circumstances of the present case, according to Bhurkiben, the complaint was recorded at village Manka and by that time, she must have come to know the full story. There was no reason for her to omit the names of Dutiyo and Babubhai if they really witnessed the incident. It is also in evidence that

Keshliben had not stated before the police that the accused had come to call her husband and her husband had gone with him. She had also not stated before the police that the accused had taken her husband into the house saying that he would give the money. She had not stated before the police that thereafter, the accused had given an axe blow on the forehead of her husband or that she had gone to inform her mother-in-law where she was making dung cakes or that she had gone to the police station at Chhota Udepur to lodge the complaint but the accused had already surrendered himself or that the complaint was recorded at village Manka and it was given by her mother-in-law. Dutiyo also had not stated in his police statement that the accused had dragged his brother into his house. Dutiyo also admitted in his cross-examination that he had not stated before the police that the accused had called his brother to settle the account of Rs.15,000/-. He also said in cross-examination that on seeing the dead body of his brother, all three of them had raised shouts and his mother had come. He stated that he had gone home to call his mother.

14. Thus, the prosecution story was that the accused had punctured the eye of Dutiyo by shooting an arrow and had promised to pay Rs.15,000/- and on the date of the incident, the accused invited the deceased to his house to make the payment. The parties are poor tribals. It seems improbable that the accused could have promised to pay such a huge amount and that he would have called the deceased to his house to make the payment though he had no means to pay the same. According to Dutiyo they were already standing outside the house of the accused and the accused had dragged his brother in. He does not say that the accused had come to their house to call him. According to Keshliben, the accused came to their house to call her husband and they followed him to his house.

15. According to the prosecution, keshli's son Babu, aged about 10, was also an eye-witness but he was not examined. Bhurkiben stated in her cross-examination that Babu had gone to school and had returned at 6 o'clock in the evening. The defence has also examined Raisingbhai Hirlabhai (D.W.1), who was a teacher in the school. He produced the attendance register to show that Babu had attended the school on that day. This also creates doubt as to whether Babu, who was claimed to be present, was really present when the incident occurred.

16. It was suggested to Dutiyo in cross-examination that he had gone to graze cattle. He denied the same and said that it was Navsing Masla who had gone. The defence

also examined Navsing Masla who stated that he had gone to work as a mason from 8 to 6 o'clock on that day.

17. Thus, the above circumstances create doubt as to whether the F.I.R. was lodged at the time and place it purports to have been lodged. They also raise doubt about the genesis of the incident and the presence of Keshli and Dutiyo. The benefit of this doubt must go to the accused. All that could be urged on behalf of the prosecution was that the dead body was found in the house in which the accused was living. However, it is in evidence that the house belonged to the father of the accused and as stated by Navsing Masla (D.W.2), Bhalu Fatu, the father of the accused and his five sons all lived together in the same house. The F.S.L. report shows that no blood-stains were found on the axe which was allegedly produced by the accused. Hence, it is not possible to say that the crime was committed by the accused when so many other persons, besides the accused, were living in the house in which the dead body was found.

18. The result of the above discussion is that the accused is entitled to benefit of the doubt. The appeal is, therefore, allowed. The judgment and order of the learned Additional Sessions Judge, Vadodara (Camp at Chhota Udepur) dated 20th February, 1996, in Sessions Case No.11 of 1995, convicting and sentencing the appellant for the offence under Section 302 of the I.P.C., is set aside. The appellant is acquitted of the charge under Section 302 of the I.P.C. He shall be released from the jail immediately, if not required in any other case.

(M.H. Kadri, J.)

(M.C. Patel, J.)

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